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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NAVNEET SHARDA, M.D., an Individual,

Plaintiff,

vs.

SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, a foreign limited liability company; THE BOARD OF TRUSTEES OF SUNRISE HOSPITAL; SUSAN REISINGER, an individual; DIPAK DESAI, an individual; NEVADA STATE BOARD OF MEDICAL EXAMINERS; KATHERINE KEELEY, an individual; DOE Individuals I through X; and ROE CORPORATIONS and ORGANIZATIONS I through X, inclusive,

Defendants.

Case No. 2:16-cv-02233-JCM-GWF

DEFENDANTS SUNRISE HOSPITAL AND MEDICAL CENTER, LLC (INCLUDING ITS BOARD OF TRUSTEES), SUSAN REISINGER, M.D., AND KATHERINE KEELEY, M.D., D.D.S.'S MOTION TO DISMISS

REDACTED

Defendants Sunrise Hospital and Medical Center, LLC (including its Board of Trustees) ("Sunrise Hospital"), Susan Reisinger, M.D. ("Dr. Reisinger"), and Katherine Keeley, M.D., D.D.S.

("Dr. Keeley") (collectively, the "Sunrise Defendants") hereby move to dismiss Plaintiff Navneet Sharda, M.D.'s ("Dr. Sharda") claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). This Motion to Dismiss is based on the following Memorandum of Points and Authorities, all papers on file with this Court, any documents incorporated by reference or attached to the First Amended Complaint, and any oral argument this Court may entertain.

DATED this 30th day of December, 2016.

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By: /s/ John R. Bailey
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JOSHUA M. DICKEY
PAUL C. WILLIAMS
Attorneys for Defendants Sunrise Hospital and Medical Center, LLC (including its Board of Trustees), Susan Reisinger, M.D., and Katherine Keeley, M.D., D.D.S.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Simply put, Dr. Sharda's First Amended Complaint fails to state plausible claims for relief against the Sunrise Defendants and should be dismissed. First, Dr. Sharda's failure to exhaust the administrative remedies afforded to him under Sunrise Hospital's Medical Staff Bylaws (the "Bylaws") necessitates the dismissal of his claims. Courts routinely hold that a physician must exhaust any remedies afforded to him or her under a hospital's bylaws prior to initiating a lawsuit. Here, Dr. Sharda initiated this action prior to exhausting the remedies afforded to him under the Bylaws—specifically, a fair hearing and any appellate remedies (if necessary).

Second, the Health Care Quality Improvement Act's ("HCQIA") immunity for peer review actions bars all of Dr. Sharda's claims in this matter. Congress enacted HCQIA to restrict the ability of incompetent physicians to move from state to state without disclosure or discovery of the physicians' previous damaging or incompetent performance. In providing immunity under HCQIA, Congress sought to limit the threat of lawsuits by physicians who have been denied clinical privileges as a result of peer review actions—recognizing such lawsuits would have a chilling effect on the peer review process. As demonstrated below, Sunrise Hospital meets all of the requisites for the application of HCQIA immunity in this matter.

Third, regardless of his failure to exhaust his administrative remedies and the application of HCQIA immunity—both of which necessitate dismissal of *all* of his claims—each of Dr. Sharda's claims fails as a matter of law. Specifically:

- Dr. Sharda's due process claim fails because Sunrise Hospital is not a state actor and its engagement in peer review does not constitute a state action.
- Dr. Sharda's antitrust claim fails because he fails to allege: (a) the existence of a relevant market; (b) that Sunrise Hospital has market power in a relevant market; (c) an injury to competition; (d) that he suffered an antitrust injury; and (e) a plausible agreement among the Sunrise Defendants and others to restrain competition.
- Dr. Sharda's claim for tortious interference with contractual relations fails because: (a) it is premised upon Sunrise Hospital's mandatory report to the National Practitioner Data Bank and is thus privileged under HCQIA; (b) he cannot establish that Sunrise Hospital intended, or had any motive, to affirmatively induce any third parties to breach their alleged contracts with him; and (c) he cannot establish that the actions taken by Sunrise Hospital were unlawful or improper.
- Dr. Sharda's claim for breach of contract fails because: (a) the Bylaws do not form a contractual relationship between Sunrise Hospital and members of its medical staff; and (b) even assuming, *arguendo*, the Bylaws did form a contractual relationship between Sunrise Hospital and members of its medical staff (which they do not), he is not a member of the medical staff and thus cannot assert a claim for breach of an alleged contract to which he is not a party.
- Dr. Sharda's claim for civil conspiracy fails because: (a) he cannot support his civil conspiracy claim without a viable underlying tort; (b) he does not allege a plausible agreement among the Sunrise Defendants and others to harm him; and (c) Sunrise Hospital and Drs. Reisinger and Keeley—members of Sunrise Hospital's medical staff—legally could not have conspired together due to the intracorporate conspiracy doctrine.
- Injunctive Relief is a remedy and not a separate cause of action.
- Dr. Sharda's declaratory relief claim should be dismissed because it will "neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties."[1]

In sum, Dr. Sharda fails to allege plausible claims against the Sunrise Defendants. Dr. Sharda failed to exhaust the administrative remedies afforded to him under the Bylaws, his claims are barred by HCQIA, and all of his claims fail as a matter of law in any event. Accordingly, the Sunrise Defendants respectfully request that this Court dismiss the First Amended Complaint.

[1] *United States v. State of Wash.*, 759 F.2d 1353, 1357 (9th Cir. 1985).

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II. FACTS

A. The Parties.

Dr. Sharda is a Nevada physician who formerly held privileges at Sunrise Hospital, which he allowed to lapse (most recently) on November 1, 2013. (ECF No. 11, First Am. Compl., Nov. 15, 2016 [hereinafter, "FAC"], ¶¶ 1, 18, 43.)

Sunrise Hospital is a Delaware limited liability company with its principal place of business in Clark County, Nevada. (*Id.* ¶ 2.) Sunrise Hospital's Board of Trustees is not a separate entity, but a group of individuals with oversight and decision-making responsibilities over Sunrise Hospital. (*Id.* ¶ 4; *see also* Exhibit A, Excerpt of Medical Staff Bylaws, Nov. 25, 2013 ["Bylaws"], at 7-8, § 1.4.)[2] Dr. Reisinger is a Nevada physician and was the Chief of Radiation Oncology at Sunrise Hospital. (ECF No. 11, FAC ¶ 34.) Dr. Keeley is the Chief of Staff of Sunrise Hospital's medical staff. (*Id.* ¶ 55.)

The Nevada State Board of Medical Examiners (the "Board of Medical Examiners") is a political subdivision of the State of Nevada. (*Id.* ¶ 7.)

Dipak Desai, M.D. ("Dr. Desai") is a Nevada resident, formerly a Nevada-licensed physician, currently incarcerated at the Northern Nevada Correctional Center. (*Id.* ¶¶ 6, 102.) The Board of Medical Examiners accepted Dr. Desai's surrender of his Nevada medical license on February 24, 2010, "due to physical and mental impairments arising from a series of strokes." (*See* Exhibit B, Nevada State Board of Medical Examiners, Licensee Details – Dipak Kantilal Desai, at 2.)[3]

B. The Medical Staff Bylaws.

The Bylaws (of Sunrise Hospital) govern the process by which physicians may obtain privileges to practice medicine at Sunrise Hospital as well the procedures for peer review actions. (*See* Exhibit A, Bylaws, at 6-7, § 1.2 – 1.3.) Although the Bylaws govern medical staff membership, the Bylaws do not create a contractual relationship between Sunrise Hospital and members of its medical staff:

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[2] This Court may consider the Bylaws without converting this Motion to Dismiss into a motion for summary judgment because the Bylaws are referenced in the First Amended Complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *see also Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

[3] This Court may take judicial notice of the Nevada State Board of Medical Examiners' licensee details for Dr. Desai without converting this Motion to Dismiss into a motion for summary judgment because the licensee details are a public record. *See Lee*, 250 F.3d at 689.

> 12.5.8. NO CONTRACT INTENDED
>
> Notwithstanding anything herein to the contrary, it is understood that these Bylaws and the Rules and Regulations do not create, nor shall they be construed as creating, in fact or by implication or otherwise, a contract or agency relationship of any nature between or among the Hospital or the Board of Trustees or the Medical Staff and any Member of the Medical Staff or any person granted clinical privileges. Any clinical or other privileges are simply privileges which permit conditional use of the Hospital facilities, subject to the terms of these Bylaws and the Rules and Regulations.

(*Id.* at 95, § 12.5.8.)

The Bylaws provide that membership on Sunrise Hospital's medical staff "is a privilege extended by the Hospital, and not a right of any Physician, Practitioner or other person." (*Id.* at 8, § 2.1.) The Bylaws contain certain threshold eligibility criteria, which an applicant must meet to be eligible to become a member of the medical staff—but do not guarantee he or she will become a member—including:

- The Physician can "document his or her (i) background, experience, training and demonstrated competence; (ii) adherence to the ethics of their profession; (iii) good reputation and character . . ." (*id.* at 10, § 2.2.4);
- The Physician has "never been convicted of a criminal offense or ordered by a court to pay a judgment imposing civil monetary penalties related to the provision of health care items or services under Medicare, Medicaid or any other federal or state health care program or private health insurance plan" (*id.* at 10, § 2.2.9); and
- The Physician has "never had Medical Staff appointment, employment or clinical privileges denied, revoked, or terminated by any health care facility or health plan for reasons related to clinical competence or professional conduct" (*id.* at 10, § 2.2.11).

The Bylaws also enumerate certain factors that are to be evaluated in determining the fitness of a physician to be appointed to the medical staff including: competence, experience, judgment, conduct, behavior, professional ethics, character, and commitment to quality care. (*Id.* at 13-14, § 2.4.) The Bylaws also provide that no physician is entitled to appointment as a member of the medical staff at Sunrise Hospital. (*Id.* at 14, § 2.5.)

A physician seeking appointment to Sunrise Hospital's medical staff must submit a Request for Consideration detailing the physician's qualifications to become a member of the medical staff.

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(*Id.* at 16-26, § 2.9.) The physician seeking appointment has "the burden of producing information deemed adequate by the Hospital for a proper evaluation of current competence, character, ethics, and other qualifications and for resolving any doubts about an individual's qualifications." (*Id.* at 17, § 2.9.1.3.) The information required "includes such quality data and other information as may be needed to assist in an appropriate assessment of overall qualifications for appointment, reappointment, and current clinical competence for any requested clinical privileges or scope of practice, including, but not limited to, information from other hospitals, [and] information from the individual's office practice . . . ." (*Id.*)

The Bylaws contain an administrative remedy—a fair hearing and appeal process—through which a physician may challenge an adverse action with respect to medical staff privileges, including the denial of appointment to the medical staff. (*Id.* at 51-60, § 6; *see also id.* at 53, § 6.3.1.1.) A physician must request a fair hearing within thirty (30) days of receiving notice of an adverse action. (*Id.* at 54, § 6.3.3.) A physician also has the right to request a "pre-hearing conference to resolve procedural issues (i.e., determine the documentation that the affected Practitioner has the right to receive, and the timeframe for exchanging documents and witness lists)." (*Id.* at 56, § 6.5.5.1.)

The Bylaws also provide that a physician seeking clinical privileges at Sunrise Hospital "agrees that the hearing and appeal procedures set forth in the [] Bylaws are the sole and exclusive remedy with respect to any professional review action taken by the Hospital . . . ." (*Id.* at 22, § 2.9.3.9.) Further, the Bylaws require "that, if any adverse action is made with respect to" a physician seeking privileges, the physician must "follow and ***exhaust the administrative remedies*** afforded by the . . . Bylaws and the Hearing Procedure ***as a prerequisite to any other action*** . . . ." (*Id.* (emphasis added).) The Bylaws also express that the physician will "have the burden of demonstrating that he or she meets the standards for appointment . . . to the Medical Staff or for the clinical privileges requested" throughout the fair hearing and appeal process. (*Id.*)

C. Dr. Sharda Obtains Privileges at Sunrise Hospital.

In 2001, Dr. Sharda made a request for clinical privileges at Sunrise Hospital. (ECF No. 11, FAC, ¶ 19.) Dr. Sharda's request was initially denied as he failed to arrange for cross-coverage with

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another physician. (*Id.* ¶ 21.) Subsequently, on December 3, 2001, Dr. Sharda was granted temporary privileges, which gave him the ability to use Sunrise Hospital's facilities to conduct in-patient consulting services and oncological surgical procedures. (*Id.* ¶¶ 23-24.)

On July 31, 2003, Dr. Sharda's privileges were advanced to Active Staff status. (*Id.* ¶ 30.) Dr. Sharda maintained privileges up to October 31, 2011. (*Id.* ¶¶ 30-33, 37.)

D. Dr. Sharda Allows his Privileges at Sunrise Hospital to Lapse.

On November 1, 2011, Dr. Sharda's privileges at Sunrise Hospital lapsed as he had failed to provide adequate documentation in connection with his Request for Consideration for privileges. (*Id.* ¶¶ 35, 37.) Dr. Sharda subsequently provided the missing documentation to Sunrise Hospital and his privileges were reinstated on January 23, 2012. (*Id.* ¶ 43.)

On November 1, 2013, Dr. Sharda again failed to provide adequate documentation with his application for privileges and, as a result, his privileges at Sunrise Hospital again lapsed. (*Id.* ¶ 43.) On November 5, 2013, Dr. Sharda appeared before Sunrise Hospital's Credentials Committee (the "Credentials Committee") to discuss his then-pending Request for Consideration. (*Id.* ¶ 44.) On December 16, 2013, the Credentials Committee sent a letter to Dr. Sharda advising him that it needed certain additional documentation from him (the "Request for Additional Information Letter"). (*Compare id.* ¶ 48 *with* Exhibit C, Letter from Robert C. Rollins, M.D. to Dr. Sharda, Dec. 16, 2013 ["RFA Letter"], at 1.)[4] Specifically, the Credentials Committee requested that Dr. Sharda provide the following information:

[redacted]

[redacted]

[redacted]

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[4] This Court may consider the correspondence between the parties without converting this Motion to Dismiss into a motion for summary judgment because the correspondence is either referenced in, or necessarily relied upon by, the First Amended Complaint. *See Lee*, 250 F.3d at 688–89.

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[redacted]

(*Compare* SAC ¶ 48 *with* Exhibit C, RFA Letter, at 1.)

Dr. Sharda did not respond to the Request for Additional Information. (*Compare* FAC ¶ 56 *with* Exhibit D, Letter from Dr. Rollins to Dr. Sharda, Feb. 16, 2014 ["Feb. 16, 2014 Letter"].) On February 16, 2014, the Credentials Committee sent a letter to Dr. Sharda advising him that, based on his failure to provide the additional requested information, his Request for Reconsideration had been deemed incomplete and its processing had been discontinued. (*Compare* FAC ¶ 56 *with* Exhibit D, Feb. 16, 2014 Letter.)

Over one year later, on May 7, 2015, Dr. Sharda sent a letter to the Credentials Committee in response to the February 16, 2014 letter, contending that he should not have to provide the information requested by the Credentials Committee. (*Compare* FAC ¶ 57 *with* Exhibit E, Letter from Dr. Sharda to Dr. Rollins, May 7, 2015.) On May 12, 2015, the Credentials Committee sent a letter in response to Dr. Sharda's letter, again advising him that the Request for Consideration had been deemed incomplete and its processing had been discontinued. (*Compare* FAC ¶ 58 *with* Exhibit F, Letter from Dr. Sharda to Dr. Rollins, May 12, 2015.)

E. Dr. Sharda Submits a Request for Consideration for Privileges and Again Fails to Timely Provide the Requested Information.

On July 27, 2015, Dr. Sharda submitted another Request for Consideration for privileges at Sunrise Hospital (the "July 2015 Request for Consideration"). (ECF No. 11, FAC ¶ 30.) On August 4, 2015, the Credentials Committee notified Dr. Sharda that the July 2015 Request for Consideration could not be processed because: (1) he failed to submit proof that he had satisfied certain conditions imposed by the NSBME pursuant to a settlement agreement dated September 4, 2014; and (2) he had still not provided the information requested by the Credentials Committee in the Request for Additional Information Letter. (*Compare id.* ¶ 31 *with* Exhibit G, Letter from Jeffrey A. Murawsky, M.D. to Dr. Sharda, Aug. 4, 2015 ["Aug. 4, 2015 Letter"], at 1-2.)

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Because Dr. Sharda did not timely provide the information necessary for the Credentials Committee to process the July 2015 Request for Consideration, it was deemed incomplete and its processing was discontinued. (*Compare* ECF No. 11, FAC ¶ 61 *with* Exhibit H, Letter from Dr. Murawsky to Dr. Sharda, Oct. 20, 2015.)

F. Dr. Sharda Submits Another Request for Consideration for Privileges at Sunrise Hospital; Dr. Sharda Consults with a Patient at Sunrise Hospital Despite Lacking Privileges.

On October 31, 2015, Dr. Sharda submitted another Request for Consideration for privileges at Sunrise Hospital (the "October 2015 Request for Consideration"). (ECF No. 11, FAC ¶ 62.)

On December 13, 2015, Dr. Sharda consulted with a patient of Sunrise Hospital even though he lacked privileges at Sunrise Hospital. (*Id.* ¶¶ 67-69.) According to Dr. Sharda, a hospitalist invited him to consult with the patient at Sunrise Hospital.[5] (*Compare id.* ¶¶ 63, 67, 71 *with* Exhibit I, Letter from Todd P. Sklamberg to Dr. Sharda, Dec. 18, 2015 ["Dec. 18, 2015 Letter"].) Dr. Sharda does not allege that the hospitalist had knowledge that Dr. Sharda lacked privileges at Sunrise Hospital or that the hospitalist had authority to authorize Dr. Sharda to practice medicine at Sunrise Hospital in violation of the Bylaws. (*See* ECF No. 11, FAC ¶¶ 62-74.)

On December 18, 2015, Sunrise Hospital sent a letter to Dr. Sharda, demanding that he cease and desist from providing medical services to patients at Sunrise Hospital because he lacked privileges to do so. (*Compare* ECF No. 11, FAC ¶¶ 71-72 *with* Exhibit I, Dec. 18, 2015 Letter.)

G. Sunrise Hospital Denies Dr. Sharda's Request for Consideration.

On January 5, 2016, Sunrise Hospital's Credentials Committee met and reviewed Dr. Sharda's October 2015 Request for Consideration. (*Compare* ECF No. 11, FAC ¶ 75 *with* Exhibit J, Letter from Stephen M. Wold, M.D. to Dr. Sharda, Jan. 20, 2016 ["Jan. 20, 2016 Letter"].) The Credentials Committee, on a unanimous vote, elected to recommend to Sunrise Hospital's Medical Executive Committee (the "MEC") that the October 2015 Request for Consideration be denied. (Exhibit J, Jan. 20, 2016 Letter.)

[5] Sunrise Hospital disputes that a hospitalist invited Dr. Sharda to consult with a patient at Sunrise Hospital.

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On January 21, 2016, the MEC evaluated Dr. Sharda's October 2015 Request for Consideration. (*Compare* ECF No. 11, FAC ¶ 75 *with* Exhibit K, Letter from Dr. Wold to Dr. Sharda, Jan. 27, 2016 ["Jan. 27, 2016 Letter"] at 1.) The MEC accepted the Credential Committee's recommendation to deny Dr. Sharda's October 2015 Request for Consideration. (*Compare* ECF No. 11, FAC ¶ 75 *with* Exhibit K, Jan. 27, 2016 Letter at 1.) The MEC's decision was based upon, in part, the following factors: [redacted] (Exhibit K, Jan. 27, 2016 Letter at 1.)

Sunrise Hospital advised Dr. Sharda of his rights under the Bylaws, including, among others, his right to request a fair hearing within thirty (30) days of receiving notice of the MEC's decision to deny his October 2015 Request for Consideration. (*Id.* at 1-2.)

H. Dr. Sharda Requests a Fair Hearing, but Fails to Complete the Process.

On February 23, 2016, pursuant to the Bylaws, counsel for Dr. Sharda requested a fair hearing (the "Fair Hearing") with respect to the MEC's decision to deny his October 2015 Request for Consideration and also requested a [redacted] (*Compare* ECF No. 11, FAC ¶ 78 *with* Exhibit L, Letter from H. Stan Johnson, Esq. to Todd P. Sklamberg, Feb. 23, 2016 ["Feb. 23, 2016 Letter"], at 1.) On March 7, 2016, counsel for Sunrise Hospital acknowledged Dr. Sharda's request for a Fair Hearing and advised counsel for Dr. Sharda to contact his office to arrange a [redacted] (*Compare* ECF No. 11, FAC ¶ 78 *with* Exhibit M, Letter from John R. Bailey, Esq. to H. Stan Johnson, Esq., March 7, 2016 ["March 7, 2016 Letter"].) Counsel for Sunrise Hospital also requested counsel for Dr. Sharda to advise [redacted] (*Id.* (emphasis added).)

Although Dr. Sharda acknowledges Sunrise Hospital requested that he provide dates concerning the Fair Hearing, Dr. Sharda does not (and cannot) allege that he has responded to

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Sunrise Hospital's request for dates and times for the pre-hearing conference and for dates relating to the Fair Hearing. (*Compare* ECF No. 11, FAC ¶¶ 124-126 *with* Exhibit N, Letter from John R. Bailey, Esq. to H. Stan Johnson, Esq. Sept. 12, 2016 ["Sept. 12, 2016 Letter"] *and* Exhibit O, Email from H. Stan Johnson Esq. to Alice O'Hearn, Sept. 12, 2016 ["Sept. 12, 2016 Email"].)

III. ARGUMENT

A. Standard of Decision.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted). Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678–79.

In deciding a motion to dismiss, the court may consider materials outside the pleadings if those materials are attached to the complaint, *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990), or are referenced by the complaint, *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987), or are properly subject to judicial notice, *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

B. Dr. Sharda's Failure to Exhaust the Administrative Remedies Afforded to Him under the Bylaws is Fatal to All of His Claims.

"It is widely held that a physician is required to exhaust all available internal remedies provided by a hospital before instituting a judicial action for damages arising from exclusion or expulsion." *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 82 (N.D. 1991); *accord Eidelson v. Archer*, 645 P.2d 171, 177 (Alaska 1982) ("[T]he exhaustion of remedies doctrine is applicable to cases involving the loss by a physician of hospital privileges."); *Westlake Cmty. Hosp.*

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v. Superior Court, 551 P.2d 410, 411 (Cal. 1976) ("[B]efore a doctor may initiate litigation challenging the propriety of a hospital's denial or withdrawal of privileges, he must exhaust the available internal remedies afforded by the hospital."); *Nemazee v. Mt. Sinai Med. Ctr.*, 564 N.E.2d 477, 482 (Ohio 1990) ("[A] physician in a private hospital whose . . . hospital privileges have been terminated must exhaust all internal administrative remedies provided by a hospital's charter, bylaws, rules, regulations and employment contract prior to seeking judicial review.").

A physician's failure to exhaust administrative remedies necessitates a dismissal of the physician's claims—whether they sound in contract or tort. *See Westlake Cmty. Hosp.*, 551 P.2d at 412 (holding physician's failure to exhaust administrative remedies for termination of privileges required dismissal of physician's claims for intentional interference, conspiracy, intentional infliction of emotional distress, and fraud); *see also Nemazee*, 564 N.E.2d at 482-83 (affirming dismissal of physician's claims for breach of contract and intentional infliction of emotional distress where physician failed to exhaust remedies afforded to him under hospital's bylaws).

Here, Dr. Sharda has plainly failed to exhaust the administrative remedies afforded to him under the Bylaws. Dr. Sharda requested a fair hearing and a pre-hearing conference. (ECF No. 11, FAC, ¶ 78.) However, Dr. Sharda has utterly failed to provide Sunrise Hospital with his availability for either the fair hearing or the pre-hearing conference (the right to which Dr. Sharda invoked and must be completed prior to the fair hearing). (Exhibit N, Sept. 12, 2016 Letter; Exhibit O, Sept. 12, 2016 Email.) Indeed, as detailed above, the Bylaws expressly require Dr. Sharda to "***exhaust the administrative remedies*** afforded by the . . . Bylaws and the Hearing Procedure ***as a prerequisite to any other action*** . . . ." (Exhibit A, Bylaws at 22, § 2.9.3.9 (emphasis added).)

Because Dr. Sharda has failed to exhaust the administrative remedies afforded to him under the Bylaws, his claims—sounding in both contract and tort—fail as a matter of law. *See Eidelson*, 645 P.2d at 177; *Westlake Cmty. Hosp.*, 551 P.2d at 411; *Soentgen*, 467 N.W.2d at 82; *Nemazee*, 564 N.E.2d at 482.

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C. HCQIA Bars all of Dr. Sharda's Claims.

Each claim asserted by Dr. Sharda fails as a matter of law because he cannot overcome the presumption that the peer review actions by Sunrise Hospital met the requisites for immunity as set forth in HCQIA.

In order to provide extra incentive for physicians to engage in vigorous and effective peer review, Congress passed HCQIA. *Chalal v. Northwest Med. Ctr., Inc.,* 147 F. Supp. 2d 1160, 1170 (N.D. Ala. 2000). The purpose of HCQIA is to restrict the ability of incompetent physicians to move from state to state without disclosure or discovery of the physician's previous damaging or incompetent performance. *Imperial v. Suburban Hosp. Ass'n, Inc.*, 37 F.3d 1026, 1028 (4th Cir. 1994) (citing 42 U.S.C. § 11101). Further, by providing immunity under HCQIA, Congress intended to encourage effective hospital peer review procedures by limiting the threat of litigation by physicians who have been disciplined as a result of reasonable peer review proceedings. *Meyer v. Sunrise Hosp.*, 22 P.3d 1142, 1148-49 (Nev. 2001)

In order to accomplish its purposes, HCQIA provides immunity from damage suits to participants in a "professional review action" by a "professional review body" which meets certain fairness requirements set forth in HCQIA. *Meyer*, 22 P.3d at 1148-49; *see also Chalal*, 147 F. Supp. at 1170. As a hospital licensed to provide health care services, Sunrise Hospital is a "professional review body." *See* 42 U.S.C. § 11151(4)(A)(i). Immunity under HCQIA also extends to persons who participate or assist the professional review body during the peer review process. *See* 42 U.S.C. § 11151(11); *see also Imperial v. Suburban Hosp. Ass'n, Inc.*, 862 F. Supp. 1390, 1396 (D. Md. 1993). A hospital's decision to deny a physician's application for clinical privileges constitutes a "professional review action" subject to HCQIA. *See* 42 U.S.C.A. § 11151(10)(a).

Whether a party is entitled to immunity under HCQIA is a question of law for the court to decide. *Meyer*, 22 P.3d at 1149. Indeed, HCQIA immunity may be decided on a motion to dismiss. *See Straznicky v. Desert Springs Hosp.*, 642 F. Supp. 2d 1238, 1248–49 (D. Nev. 2009) (granting motion to dismiss based on HCQIA immunity); *accord Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1332 (11th Cir. 1994) ("Congress clearly intended HCQIA to permit defendants in suits arising out of peer review . . . to file a dispositive motion to resolve the issue concerning immunity from monetary liability as early as possible in the litigation process.”).

In making this determination, HCQIA creates ***a rebuttable presumption in favor of immunity*** for the reviewing body. *Meyer*, 22 P.3d at 1149; *see also Chalal*, 147 F. Supp. at 1170-71. Thus, unlike most motions where the moving party bears the burden of proof, here Dr. Sharda bears the burden of demonstrating that the disputed professional review process was not reasonable and thus did not meet the standard for immunity under HCQIA. 42 U.S.C.A. § 11111(a); *Meyer*, 22 P.3d at 1149; *see also Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2nd Cir. 1992) (holding that hospital’s review of physician’s professional competency is presumed to have met standards of HCQIA unless physician rebutted that presumption by preponderance of the evidence). Further, conclusory allegations are insufficient to rebut the presumption of immunity under HCQIA. *Wayne v. Genesis Med. Ctr.*, 140 F.3d 1145, 1149 (8th Cir. 1998).

Immunity under HCQIA is conditioned upon the peer reviewers satisfying the standards set forth in § 11112(a). 42 U.S.C. § 11111(a). Those standards require that the professional review action be taken: “(1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts . . . .” 42 U.S.C. § 11112(a). However, HCQIA also provides that failure to meet all the conditions set forth in subsection (a) does not, in itself, constitute a failure to satisfy the subdivision (a)(3) requirement, allowing for the possibility that other procedures that are fair to the physician will satisfy the requirements for immunity under subdivision (a)(3). 42 U.S.C. § 11112(a)(1)-(4).

1. Sunrise Hospital Based its Decisions on the Reasonable Belief that it was Acting in Furtherance of Quality Health Care.

The first requisite for immunity under HCQIA is satisfied when a peer review body reasonably concludes that the action would restrict incompetent behavior or protect patients based upon the information available to it at the time of the professional review action. 42 U.S.C. §

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11112(a)(1). In making this determination, "the role of federal courts on review of such actions is not to substitute [their] judgment for that of the hospital's governing board or to reweigh the evidence . . . ." *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1337 (11th Cir. 1994). Further, the first requisite for immunity focuses on the reasonableness of the peer reviewers' beliefs, and it is immaterial whether the peer review action proves to be medically sound. *See Poliner, M.D. v. Tex. Health Sys.*, 537 F.3d 368, 378 (5th Cir. 2008) (stating that HCQIA "does not require that professional review result in an actual improvement of the quality of health care, nor does it require that the conclusions reached by the reviewers were in fact correct.").

Here, the facts plainly establish that Sunrise Hospital's decision to deny privileges to Dr. Sharda was based upon the reasonable belief that it was acting in furtherance of quality health care. Sunrise Hospital had concerns over Dr. Sharda's competence. (*See* Exhibit K, Jan. 27, 2016 Letter, at 1.) The MEC's decision to deny Dr. Sharda's Request for Consideration was based upon: [redacted] (*Id.*)

Accordingly, Sunrise Hospital's decision to deny Dr. Sharda's Request for Consideration was based on the reasonable belief that it was acting in furtherance of quality health care. *See Bryan*, 33 F.3d at 1337; *Poliner, M.D.*, 537 F.3d at 378.

2. Sunrise Hospital Made Reasonable Efforts to Obtain Facts During the Peer Review Process.

The second prong in evaluating a claim for immunity is determining whether the peer review body made a reasonable effort to obtain the facts. 42 U.S.C. § 11112(a)(2). This requirement is met when the totality of the process leading up to the professional review action evidenced a reasonable effort to obtain the facts of the matter. *Wahi v. Charleston Area Med. Ctr.*, 453 F. Supp. 2d 942, 952 (S.D. W. Va. 2006). To satisfy the requirements of subsection (a)(2), defendants are not required to provide a "perfect investigation" of the facts of the matter in order to qualify for immunity. *Egan v. Athol Mem'l Hosp.*, 971 F. Supp. 37, 43 (D. Mass. 1997), *aff'd*, 134 F.3d 361 (1st Cir. 1998).

Here, Sunrise Hospital made reasonable efforts to obtain facts prior to denying Dr. Sharda's Request for Consideration. Specifically, Sunrise Hospital requested additional information—the Request for Additional Information—from Dr. Sharda in order to evaluate his Request for Consideration on numerous occasions (*see, e.g.* Exhibit C, RFA Letter, at 1; Exhibit D, Feb. 16, 2014 Letter; Exhibit G, Aug. 4, 2015 Letter, at 1-2.), but he refused to provide the requested information.

Accordingly, Sunrise Hospital made more than reasonable efforts to obtain information in the peer review process. *See Wahi*, 453 F. Supp. 2d at 952; *Egan*, 971 F. Supp. at 42.

3. Dr. Sharda was Provided Adequate Notice and an Opportunity to be Heard.

HCQIA provides health care entities with a "safe harbor" provision, through which an entity is deemed to have met the adequate notice and hearing requirement if its notices and hearing procedures meet certain conditions contained in 42 U.S.C. § 11112(b). Specifically, with respect to notice, a physician must be given notice of a proposed action which states: "(A)(i) that a professional review action has been proposed to be taken against the physician, (ii) reasons for the proposed action, (B)(i) that the physician has the right to request a hearing on the proposed action, (ii) any time limit (of not less than 30 days) within which to request such a hearing, and (C) a summary of the rights in the hearing . . . ." 42 U.S.C. § 11112(b)(1). If a physician requests a fair hearing, the physician must be given notice of: (A) the place, time, and date of the hearing, which date shall not be less than 30 days after the date of the notice, and (B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body." 42 U.S.C. § 11112(b)(2).

Here, Sunrise Hospital provided notice to Dr. Sharda that it had denied his Request for Consideration. (Exhibit K, Jan. 27, 2016 Letter.) The notice that Sunrise Hospital provided to Dr. Sharda advised him of his rights under the Bylaws, mirroring the information outlined in 42 U.S.C. § 11112(b). (*Id.*) Indeed, Dr. Sharda invoked his right to a fair hearing and to a pre-hearing conference, but subsequently failed to provide Sunrise Hospital with dates that he is available for the

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fair hearing or the pre-hearing conference. (*Compare* Exhibit M, March 7, 2016 Letter *with* Exhibit N, Sept. 12, 2016 Letter *and* Exhibit O, Sept. 12, 2016 Email.)

Thus, Sunrise Hospital provided Dr. Sharda with adequate notice and opportunity to be heard. *See* 42 U.S.C. § 11112(a)(3), (b).

4. Sunrise Hospital had a Reasonable Belief that Corrective Action was Warranted Based Upon the Facts Known at the Time.

Pursuant to 42 U.S.C. § 11112(a)(4), HCQIA immunity requires the peer review body to have had a reasonable belief that corrective action was warranted based upon the facts known at the time of the peer review. This prerequisite for immunity under HCQIA does not require that professional review activities actually result in better health care. *Wahi*, 453 F. Supp. 2d at 951-52, 955. Rather, it merely requires that review actions be undertaken in the reasonable belief that quality health care was being furthered. *Id.*

An analysis under 42 U.S.C. § 11112(a)(4) closely tracks an analysis under the first requisite for immunity found in 42 U.S.C. 11112(a)(1) described above (*i.e.*, whether defendants based their decision on a reasonable belief that they were acting in furtherance of quality health care). *See Sugarbaker*, 190 F.3d at 916 ("Our analysis under § 11112(a)(4) closely tracks our analysis under § 11112(a)(1).") (internal quotations omitted). Accordingly, this prerequisite is satisfied where the reviewing body could have reasonably concluded that its action would restrict incompetent behavior or protect patients based upon the information available to it. 42 U.S.C.A. § 11112(a); *see also James E. Holmes*, 33 F.3d at 1334-35. Similarly, in making this determination, the court must avoid reweighing the evidence or substituting its own judgment for that of the peer review committee. *See Egan*, 971 F. Supp. at 44.

Here, the record establishes that Sunrise Hospital had a reasonable belief that denying Dr. Sharda's Request for Consideration would restrict incompetent behavior and protect patients. As explained above, Sunrise Hospital had concerns over Dr. Sharda's competence based on the information available to it when it evaluated his Request for Consideration. (*See* Exhibit K, Jan. 27, 2016 Letter, at 1.)

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In sum, the record before this Court unequivocally establishes that: (1) Sunrise Hospital's actions were taken in reasonable belief of furthering quality health care; (2) Sunrise Hospital made reasonable efforts to obtain the facts of the matter; (3) the procedures afforded to Dr. Sharda were adequate as he was provided with notice and and advised of the rights and remedies available to him; and (4) Sunrise Hospital had a reasonable belief that denying Dr. Sharda's Request for Consideration would restrict incompetent behavior and protect patients. Therefore, since Sunrise Hospital fully complied with the requirements for immunity under 42 U.S.C. § 11112(a), all of Dr. Sharda's claims should be dismissed.

D. Dr. Sharda's Due Process Claim Fails Because the Sunrise Defendants are not State Actors and their Decision to Deny his Request for Consideration is not a State Action.

"The central inquiry in determining whether a private party's actions constitute 'state action' under the fourteenth amendment is whether the party's actions may be 'fairly attributable to the State.'" *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1033 (9th Cir. 1989) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)), *aff'd*, 500 U.S. 322 (1991). A party asserting a state action must satisfy a two-pronged test. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

A private hospital is not a state actor and its engagement in peer review is not a state action subject to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1033-34. As explained by the Ninth Circuit Court of Appeals in *Pinhas*:

> State regulation of a private entity . . . is not enough to support a finding of state action. Pinhas must show that there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Additionally, a state may be held responsible for the action of a private party only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.
>
> The challenged action here, the removal of Pinhas's staff privileges at Midway, cannot be attributed to the state of California. Only private actors were responsible for the decision to remove Pinhas. That the decision was made pursuant to a review process that has been approved by the state is of no consequence: the decision ultimately turned on the judgments made by private

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> parties according to professional standards that are not established by the State. . . . In short, Pinhas has failed to demonstrate that the state exercised coercive power or encouraged his removal in any way.

Id. at 1034 (affirming dismissal of physician's due process claim against private hospital); *accord Straznicky v. Desert Springs Hosp.*, 642 F. Supp. 2d 1238, 1249 (D. Nev. 2009) (dismissing a physician's 42 U.S.C. § 1983 claim against private hospital based on termination of her medical staff privileges and holding a private hospital's receipt of federal funds neither renders the hospital a state actor nor causes its actions to be state actions).

Here, Dr. Sharda asserts that, as a result of Defendants' actions, he has "experienced a taking of a property right in violation of the Fourteenth Amendment of the United States Constitution." (ECF No. 11, FAC ¶ 131.) However, Dr. Sharda fails to plead any allegations indicating that the actions of the Sunrise Defendants are "fairly attributable to the State." *Pinhas*, 894 F.2d at 1033 (internal quotation marks omitted). Indeed, Sunrise Hospital is a private company, not a state actor—thus, its engagement in peer review is not a state action subject to the Due Process Clause of the Fourteenth Amendment. *Id.* at 1034.

In sum, because the Sunrise Defendants are not state actors and because their engagement in peer review is not a state action, Dr. Sharda's due process claim must be dismissed.[6] *Id.*

E. Dr. Sharda's Antitrust Claim Fails as a Matter of Law.

Although Dr. Sharda purports to assert a cause of action for "Anti-Trust Violation," he fails to identify which antitrust law his claim is premised upon. (ECF No. 11, FAC ¶¶ 135-149.) Presumably, he premises his antitrust claim upon the Sherman Act or the Nevada Unfair Trade Practices Act. Specifically, it appears that Dr. Sharda attempts to assert that a conspiracy in restraint of trade exists among the Sunrise Defendants and others to prevent him from practicing at a particular hospital (Sunrise Hospital). (*See, e.g.*, *id.* ¶¶ 144-45.) Whether under the Sherman Act or under Nevada law, Dr. Sharda's antitrust claims fail as a matter of law.

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[6] Indeed, this Court already held that Dr. Sharda's initial Complaint (ECF No. 1) failed to state a Fourteenth Amendment claim as none of the facts alleged by Dr. Sharda could "be properly construed as actions by the state." (*See* ECF No. 8, Order, at 3:27-28.) The Fourteenth Amendment claim in the First Amended Complaint is virtually identical to the Fourteenth Amendment claim in the initial Complaint and thus suffers from the same flaw. (*Compare* ECF No. 1, Complaint ¶¶ 56-72 *with* ECF No. 11, FAC ¶¶ 117-134.)

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1. ***The Sherman Act.***

Section 1 of the Sherman Act prohibits: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. The purpose of the provision is to "prohibit actions that unreasonably restrain competition." *Jack Russell Terrier Network of N. Ca. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1033 (9th Cir. 2005).

Courts analyze Section 1 claims using either a "rule of reason" or a "per se" standard. *Id.* Decisions regarding medical staff privileges are analyzed under a "rule of reason" analysis. *See Moss v. Casa Grande Cmty. Hosp., Inc.*, No. 87-1632, 1990 WL 245, at *3 (9th Cir. 1990) ("It would be difficult to think of a situation less appropriate for per se analysis than the case at hand. A medical staff's termination of one doctor's staff privileges could not have a significant adverse effect on competition, if the termination was not motivated by anti-competitive intent. . . . ***This is a rule of reason case***.") (emphasis added); *accord Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1412 (9th Cir. 1991) (holding rule of reason applied to antitrust claim based on alleged conspiracy between hospital and physicians to allow only physicians to provide services in a particular area, noting that "hospitals must make choices about the types of qualifications a practitioner must have to apply for staff privileges in various fields of practice" and that such "restrictions help [hospitals] provide more efficient, higher quality service in order to compete against other hospitals.").

Under a "rule of reason" analysis, a party asserting a Section 1 claim must establish: "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition; and (4) that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an anti-competitive aspect of the practice under scrutiny." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012) (internal quotation marks omitted).

2. ***The Nevada Unfair Trade Practices Act.***

The Nevada Unfair Trade Practices Act is similar to the Sherman Act and prohibits contracts, combinations or conspiracies in restraint of trade. *See* NRS 598A.060; *Boulware v. State of Nev., Dep't of Human Res.*, 960 F.2d 793, 800 (9th Cir. 1992) (noting that NRS 598A.060 "tracks the

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provisions of the Sherman Act"). Indeed, the Nevada Unfair Trade Practices Act contains a legislative directive that the "provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes." NRS 598A.050. However, unlike the Sherman Act, the Nevada Unfair Trade Practices Act specifically enumerates what agreements constitute an unlawful restraint of trade. *Compare* 15 U.S.C. § 1 *with* NRS 598A.060. The conduct alleged by Dr. Sharda does not fall within any of the unlawful agreements enumerated under the Nevada Unfair Trade Practices Act. *See generally* NRS 598A.060. Accordingly, any state law claim by Dr. Sharda fails as a matter of law. *See id.*

3. Dr. Sharda Fails to Allege that a Relevant Market Exists and that Sunrise Hospital has Market Power in that Relevant Market.

To "state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'" *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008). In other words, a "plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Id.*; *accord Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979) ("Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case. It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violation from the ordinary business tort."). Where a defendant has a market share of less than 30 percent—or, in some cases 50 percent—it is presumed that the defendant lacks market power. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995).

Here, the First Amended Complaint fails to allege the existence of a relevant market and that Sunrise Hospital has market power in that relevant market. (*See generally* ECF No. 11, FAC.)

Accordingly, because Dr. Sharda fails to allege facts indicating the existence of a relevant market and facts indicating that Sunrise Hospital has market power, his antitrust claims fail as a matter of law. *See Newcal Indus., Inc.*, 513 F.3d at 1044; *Kaplan*, 611 F.2d at 291.

4. Dr. Sharda Fails to Allege an Injury to Competition.

"In order to plead injury to competition, the third element of a Section 1 claim, sufficiently to withstand a motion to dismiss, a . . . claimant may not merely recite the bare legal conclusion that

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competition has been restrained unreasonably." *Brantley*, 675 F.3d at 1198. Plaintiffs "must plead an injury to competition beyond the impact on the plaintiffs themselves." *Id.* The "elimination of a single competitor, standing alone, does not prove anticompetitive effect." *Kaplan*, 611 F.2d at 291.

Here, Dr. Sharda does not allege a plausible injury to competition. Instead, he merely alleges that Defendants have "restrained competition by eliminating Sharda as one of the eligible oncologists at Sunrise." (ECF No. 11, FAC ¶ 14.) As a matter of law, this is not sufficient to establish a plausible injury to competition as the elimination of a single competitor "does not prove anticompetitive effect." *Kaplan*, 611 F.2d at 291.

Accordingly, because Dr. Sharda only alleges a harm to himself and not a harm to competition, his antitrust claim fails. *Id.*; *see also Brantley*, 675 F.3d at 1198.

5. Dr. Sharda Fails to Allege an Antitrust Injury.

"Plaintiffs must plead 'antitrust injury,' the fourth element necessary to state a Section 1 claim, in addition to, rather than in lieu of, injury to competition." *Brantley*, 675 F.3d at 1200. "That is, in order to state a claim successfully, plaintiffs must allege both that defendant's behavior is anticompetitive and that plaintiff has been injured by an anti-competitive aspect of the practice under scrutiny." *Id.* (internal quotation marks omitted). An antitrust injury consists of four elements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Somers v. Apple, Inc.*, 729 F.3d 953, 963–64 (9th Cir. 2013) (internal quotation marks omitted).

Courts routinely hold that the denial or revocation of clinical privileges does not constitute an antitrust injury as a matter of law. *See Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) ("[T]he revocation of Oksanen's staff privileges, while undoubtedly impacting adversely on his practice, has not been shown to have had any adverse impact on competition in the relevant market. Consequently, his section one claim fails."); *see also Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996) (affirming district court's finding that hospital's imposition of restrictions on physician's clinical privileges was not an antitrust injury); *Baglio v. Baska*, 940 F. Supp. 819, 830 (W.D. Pa. 1996) (holding physician did not suffer antitrust injury based on termination of his clinical privileges), *aff'd,* 116 F.3d 467 (3d Cir. 1997); *Robles v. Humana Hosp.*

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Cartersville, 785 F. Supp. 989, 999 (N.D. Ga. 1992) ("The harm alleged in the complaint is really only harm to the individual doctor and not to competition within the marketplace. Thus, reduced to its essentials, plaintiff['s] Sherman Act claims rest not on a showing of anti-competitive impact, but merely on the fact that [he] is [a] disappointed competitor who will now be forced to provide [obstetric] services elsewhere.").

Here, Dr. Sharda has merely alleged that he has suffered personal injury because he is no longer able to practice medicine at Sunrise Hospital. This is not an antitrust injury as a matter of law. *See Mathews*, 87 F.3d at 641; *Oksanen*, 945 F.2d at 709; *Baglio*, 940 F. Supp. at 830; *Robles*, 785 F. Supp. at 999.

6. Dr. Sharda Fails to Allege a Plausible Agreement Among the Sunrise Defendants and Others to Restrain Competition.

In order to plead a viable Section 1 claim, a plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made" to restrain competition. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "[L]awful parallel conduct fails to bespeak unlawful agreement" and thus "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to plead a viable Section 1 claim. *Id.* "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality" and thus "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 556–57.

Here, Dr. Sharda fails to allege sufficient facts to show a plausible agreement among the Sunrise Defendants and others to restrain competition. His bare assertion that "Defendants deliberately and unlawfully restrained competition by eliminating Sharda as one of the eligible oncologists at Sunrise" fails to allege an actionable agreement to restrain competition. (ECF No. 11, FAC ¶ 144.) Indeed, the specific conduct alleged by Dr. Sharda to support the alleged agreement—such as investigations by the Board of Medical Examiners, peer review actions at Sunrise Hospital, etc.—is merely parallel conduct that is also consistent with lawful behavior. *Twombly*, 550 U.S. at 556–57. Thus, Dr. Sharda's antitrust claim fails to plead a plausible agreement among the Sunrise

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Defendants and others to restrain competition and should be dismissed. *Id.*; *see also Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.").

In sum, Dr. Sharda's antitrust claim fails because the First Amended Complaint fails to allege: (i) the existence of a relevant market; (ii) that Sunrise Hospital has market power in a relevant market; (iii) an injury to competition; (iv) that he suffered an antitrust injury; and (v) a plausible agreement among the Sunrise Defendants and others to restrain competition.

F. Dr. Sharda's Claim for Tortious Interference is Barred by HCQIA, and, in any Event, He Fails to Allege that Sunrise Hospital Intended to Affirmatively Disrupt his Contracts with Third Parties.

Under Nevada law, a party asserting intentional interference with contractual relations must show: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage. *J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003). A plaintiff must show the defendant intended to affirmatively induce the third party to terminate his or her contract with the plaintiff; merely taking an action which has the effect of disrupting or impeding a contract with a third party is insufficient to impose liability. *Id.* at 1268. Relatedly, "the plaintiff must establish that the defendant had a motive to induce breach of the contract with the third party." *Id.* Further, "a plaintiff must show that the means used to divert the prospective advantage was unlawful, improper or was not fair and reasonable." *See Custom Teleconnect, Inc. v. Int'l Tele-Servs., Inc.*, 254 F. Supp. 2d 1173, 1181 (D. Nev. 2003).

Initially, because Dr. Sharda bases his intentional interference claim upon Sunrise Hospital's report to the National Practitioner Data Bank ("NPDB"), it is barred as a matter of law. *See* 42 U.S.C.A. § 11137(c). Specifically, the applicable statute provides that "[n]o person or entity . . . shall be liable in any civil action with respect to any report made under this subchapter . . . without knowledge of the falsity of the information contained in the report." *Id.* Accordingly, Dr. Sharda cannot assert a claim for intentional interference based on Sunrise Hospital's report to the NPDB. *Doe v. Delnor Cmty. Health Sys.*, No. 2-10-08880, 2011 WL 10453883, at *10-11 (Ill. Ct. App.

Sept. 29, 2011) (affirming dismissal of physician's claim against hospital for intentional interference with physician's contracts with other hospitals based on report of adverse action to NPDB).

Second, Dr. Sharda does not allege that the Sunrise Defendants intended to affirmatively induce any third parties to terminate their alleged contracts with him. (*See generally* ECF No. 11, FAC.) Moreover, Dr. Sharda has not alleged that the Sunrise Defendants had any motive to induce any third parties to breach their alleged contracts with him. Even assuming, *arguendo*, the Sunrise Defendants' actions had the effect of disrupting or impeding Dr. Sharda's alleged contracts with third parties, such disruptions or impediments alone are insufficient to impose liability under Nevada law. *See J.J. Indus.*, 71 P.3d at 1268.

Third, Dr. Sharda has not alleged any facts which demonstrate that the alleged actions taken by Sunrise Hospital were unlawful, improper or were not fair and reasonable. *See Custom Teleconnect, Inc.*, 254 F. Supp. 2d at 1181. As established above, Sunrise Hospital acted in accordance with its Bylaws and the requirements of federal law in all actions it has taken.

For the foregoing reasons, Dr. Sharda's claim for intentional interference with contractual relationships fails as a matter of law. *See J.J. Indus.*, 71 P.3d at 1268; *Custom Teleconnect, Inc.*, 254 F. Supp. 2d at 1181; *Doe*, No. 2-10-08880, 2011 WL 10453883, at *10-11.

G. Dr. Sharda's Breach of Contract Claim Fails as the Bylaws do not Create a Contractual Relationship Between Him and Sunrise Hospital.

"A claim for breach of contract requires the plaintiff to demonstrate the following elements: (1) the existence of a valid contract; (2) a breach by the defendant; and (3) damages as a result of the breach." *See Cohen-Breen v. Gray Television Grp., Inc.*, 661 F. Supp. 2d 1158, 1171 (D. Nev. 2009); *see also Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2000).

The Nevada Supreme Court has not addressed whether a hospital's bylaws constitute a contract between a hospital and its medical staff.[7] However, numerous jurisdictions hold that the bylaws do not create a contractual relationship. More specifically, courts have held that where, as here, state law mandates hospitals to adopt medical staff bylaws, no consideration exists because the

[7] Indeed, the Nevada Supreme Court has expressed that the right to enjoy medical staff privileges in a private hospital is not an absolute right. *Moore v. Board of Trustees of Carson-Tahoe Hospital*, 495 P.2d 605 (1972).

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hospital is merely fulfilling ***a preexisting duty*** in enacting bylaws. *See Bhan v. Battle Creek Health Sys.*, 579 F. App'x 438, 448 (6th Cir. 2014) ("The hospitals' fulfillment of their statutory obligation to adopt and conform their actions to the bylaws, rules, and regulations does not constitute the kind of separate consideration necessary for a contractual relationship."); *Madsen v. Audrain Health Care, Inc.*, 297 F.3d 694, 699-700 (8th Cir. 2002) (affirming dismissal of physician's breach of contract claim as medical staff bylaws did not constitute a contract between the hospital and physician); *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169, 174 (Mo. 2008) ("[A] hospital's duty to adopt and conform its actions to medical staff bylaws as required by the regulation is ***a preexisting duty***, and a preexisting duty cannot furnish consideration for a contract.") (emphasis added); *Kessel v. Monongalia Cty. Gen. Hosp. Co.*, 600 S.E.2d 321, 326 (W. Va. 2004) ("[W]e conclude that the medical staff bylaws do not constitute a contract.").

Accordingly, because a preexisting duty is not sufficient consideration, medical staff bylaws only form a contractual relationship where they express an intent to do so. *See Badri v. Huron Hosp.*, 691 F. Supp. 2d 744, 769-70 (N.D. Ohio 2010) ("Bylaws can form a binding contract between the doctor and a hospital but ***only*** where there can be found in the bylaws an intent by both parties to be bound.") (emphasis added); *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 617-18 (4th Cir. 2009) ("While a hospital may be required to follow its by-laws as a due process component, there is no contractual relationship unless the by-laws specifically so provide."); *Munoz v. Flower Hosp.*, 507 N.E.2d 360, 364-65 (Ohio Ct. App. 1985) (finding that bylaws do not form a binding contract between physician and hospital unless an intent to bind both parties can be found in the bylaws).

Nevada law is in accord. The Nevada Supreme Court has held that fulfillment of ***a preexisting duty*** is not sufficient consideration to support the formation of a contract. *Clark Cty. v. Bonanza No. 1*, 615 P.2d 939, 944 (Nev. 1980) (holding a "***preexisting duty***" is not adequate consideration) (emphasis added); *Walden v. Backus*, 408 P.2d 712, 714 (Nev. 1965) ("Consideration for an agreement is not adequate when it is a mere promise to perform that which the promisor is already legally bound to do.").

Here, Sunrise Hospital is required by law to adopt medical staff bylaws. *See* NAC 449.313(2)(c)-(d) (requiring hospitals to ensure that medical staff bylaws are adopted). Thus, the adoption of the Bylaws was not sufficient consideration to establish a contract between Sunrise Hospital and Dr. Sharda under Nevada law—it was the mere fulfillment of ***a preexisting duty***. *See Bhan*, 579 F. App'x at 448; *Egan*, 244 S.W.3d at 174; *accord Bonanza No. 1*, 615 P.2d at 944. Moreover, the Bylaws expressly disclaim any intent to create a contractual relationship:

> 12.5.8. NO CONTRACT INTENDED
>
> Notwithstanding anything herein to the contrary, it is understood that these Bylaws and the Rules and Regulations do not create, nor shall they be construed as creating, in fact or by implication or otherwise, a contract or agency relationship of any nature between or among the Hospital or the Board of Trustees or the Medical Staff and any Member of the Medical Staff or any person granted clinical privileges. Any clinical or other privileges are simply privileges which permit conditional use of the Hospital facilities, subject to the terms of these Bylaws and the Rules and Regulations.

(Exhibit A, Bylaws at 95, § 12.5.8.)

Finally, Dr. Sharda is *not* a current member of Sunrise Hospital's medical staff. Dr. Sharda sought and was denied membership on the medical staff. Thus, even assuming, *arguendo*, the Bylaws formed a contract between Sunrise Hospital and its medical staff (which they do not), Dr. Sharda's claim for breach of contract fails as a matter of law because he was not (and is not) a member of the medical staff and thus not a party to the alleged contract. *See County of Clark v. Bonanza No. 1*, 615 P.2d 939, 943 (Nev. 1980) ("[N]one is liable upon a contract except those who are parties to it.").

H. Dr. Sharda's Civil Conspiracy Claim Fails as He does not Allege a Viable Underlying Tort, He does not Allege a Plausible Agreement to Commit a Tort, and Because Sunrise Hospital Cannot Conspire with its Own Medical Staff.

Civil conspiracy involves a "combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Collins v. Union Fed. Sav. & Loan Assn.*, 662 P.2d 610, 622 (Nev. 1983). Under Nevada law, to "establish a claim for civil conspiracy, a plaintiff must establish: (1) the commission of an underlying tort; and (2) an agreement between the defendants to commit that tort." *See Peterson v. Miranda*, 57 F. Supp. 3d 1271, 1278 (D. Nev. 2014); *see also Paul Steelman Ltd. v.*

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HKS, Inc., No. 2:05-CV-01330-BES-RJJ, 2007 WL 295610, at *3 (D. Nev. Jan. 26, 2007) ("Civil conspiracy is not an independent cause of action – it must arise from some underlying wrong.").

First, Dr. Sharda's civil conspiracy claim fails because he has not alleged a viable underlying tort. *See Peterson*, 57 F. Supp. 3d at 1278; *Paul Steelman Ltd.*, No. 2:05-CV-01330-BES-RJJ, 2007 WL 295610, at *3.

Second, Dr. Sharda's civil conspiracy claim fails to allege sufficient facts to show a plausible agreement among the Sunrise Defendants and others to commit a tort against him. The assertion that the Board of Medical Examiners and Drs. Reisinger, Keeley, and Desai entered into an agreement "to restrain Dr. Sharda's medical practice" is not supported by any plausible allegations of an agreement. (ECF No. 11, FAC, ¶ 98.) Specifically, the allegation that Drs. Reisinger, Keeley, and Desai would enter into an agreement "to restrain Dr. Sharda's medical practice" based on Dr. Sharda's refusal to do business with Dr. Desai in 2001 and then wait until 2015 to act upon their conspiracy is not plausible on its face. (*See id.* ¶¶ 91-115.) Indeed, the specific conduct alleged by Dr. Sharda to support the alleged agreement—investigations by the Board of Medical Examiners, peer review actions at Sunrise Hospital, etc.—is also consistent with lawful behavior. *See Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (internal quotation marks omitted); *see also Twombly*, 550 U.S. at 556–57 ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."). Thus, because Dr. Sharda's civil conspiracy claim does not allege sufficient facts to demonstrate a plausible agreement among the Sunrise Defendants and others to harm him, it should be dismissed. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556–57.

Third, agents and employees of a single corporate entity cannot conspire with their corporate principal or employer when they act in their official capacities on behalf of the corporation and not as individuals for their own individual advantage. *Collins*, 662 P.2d at 622. Thus, a hospital and its medical staff are incapable of conspiring with each other while engaging in peer review. *Buckner, M.D. v. Lower Florida Keys Hosp. Dist.*, 403 So. 2d 1025, 1029 (Fla. Ct. App. 1981) (holding that

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the hospital is viewed as a single entity acting through its staff and was, therefore, unable to conspire with itself in terminating Plaintiff's staff privileges). Here, because Sunrise Hospital and its medical staff—which includes Drs. Reisinger and Keeley—are incapable of conspiring with one another while engaging in the peer review process, the conspiracy claim fails to the extent that it is based on an alleged conspiracy among them. *See id.*

In sum, because Dr. Sharda has failed to allege a viable underlying tort and does not allege a plausible agreement among the Sunrise Defendants and others to harm him, his civil conspiracy claim fails and should be dismissed. *See Peterson*, 57 F. Supp. 3d at 1278; *Paul Steelman Ltd.*, No. 2:05-CV-01330-BES-RJJ, 2007 WL 295610, at *3. Regardless, to the extent it is based on an alleged conspiracy among the Sunrise Defendants, it should be dismissed as they cannot conspire with another as a matter of law. *See Buckner*, 403 So. 2d at 1029.

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I. Injunctive Relief is not a Separate Cause of Action.

Injunctive relief is a remedy and not a separate cause of action. *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 490 F. Supp. 2d 1091, 1130 (D. Nev. 2007) (claim for injunctive relief was "not a separate cause of action" and "not an independent ground for relief"); *Mamo v. BP PLC*, 2006 WL 269056, at *3 (E.D. Va. Jan. 30, 2006) (dismissing claim for "injunctive relief" for failure to state a claim). Here, Dr. Sharda has not asserted a viable underlying claim against the Sunrise Defendants. Accordingly, Dr. Sharda's request for injunctive relief must be dismissed. *See Simplexity, LLC*, CV 8171-VCG, 2013 WL 5702374, at *7; *Luckett*, No. 60201, 2012 WL 5857288, at *1 ("[I]njunctive relief is a remedy, not a cause of action, and thus, a cause of action must be asserted against the party before injunctive relief may be requested against that party.").

J. Dr. Sharda's Declaratory Relief Claim Should be Dismissed.

"The Declaratory Judgment Act does not grant litigants an absolute right to a legal determination." *United States v. State of Wash.*, 759 F.2d 1353, 1356 (9th Cir. 1985). In deciding whether declaratory relief is proper, courts "consider both the circumstances of the parties and the sound jurisprudence of the court." *Id.* at 1357. "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *Id.*

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Here, Dr. Sharda's declaratory relief claim does not serve a useful purpose in settling the legal relations between him and the Sunrise Defendants, and will not afford relief from any uncertainty or controversy faced by the parties. *See id.* Specifically, because Dr. Sharda has failed to exhaust the administrative remedies afforded to him under the Bylaws, it is unclear what the ultimate outcome of his Request for Consideration will be once the process is completed.

Accordingly, because Dr. Sharda's declaratory relief claim will "neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties," it should be dismissed. *See id.*

IV. CONCLUSION

For the reasons set forth above, the Sunrise Defendants respectfully request that this Court grant their Motion to Dismiss. As the Sunrise Defendants have established, the First Amended Complaint fails to state plausible claims for relief and therefore must be dismissed for three independent reasons: (1) Dr. Sharda's failure to exhaust the administrative remedies afforded to him under the Bylaws; (2) Dr. Sharda's claims are barred by HCQIA; and (3) each of Dr. Sharda's claims separately fails as a matter of law.

DATED this 30th day of December, 2016.

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By: /s/ John R. Bailey
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 30th day of December, 2016, service of the foregoing Defendants Sunrise Hospital and Medical Center, LLC (Including its Board of Trustees), Susan Reisinger, M.D., and Katherine Keeley, M.D., D.D.S.'s Motion to Dismiss was made by mandatory electronic service through the United States District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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